88-621

Supreme Court
FILE
JUL 18
JOSEPH F. SPAN
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

TOWN OF RYE, NEW HAMPSHIRE
Petitioner

v.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
AND THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION
TOWN OF HAMPTON FALLS, NEW HAMPSHIRE
Respondents

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a locality refuse to accede to the installation of a particular emergency warning system proffered by a nuclear plant operator as a part of that plant's proposed Radiological Emergency Response Plan?

LIST OF PARTIES TO THE PROCEEDING BELOW

Town of Rye, New Hampshire, and

Town of Hampton Falls, New Hampshire

vs.

Public Service Company of New Hampshire and

State of New Hampshire, Department of Transportation

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OPINIONS BELOW

On April 16, 1986, the trial court granted the Motion to Intervene filed by the Town of Hampton Falls, New Hampshire.

On November 26, 1986, the trial court entered an Order finding that the New Hampshire Department of Transportation was a necessary party to the dispute and requiring that department to file responsive pleadings (A-1). By Order dated January 20, 1987, the Superior Court found in favor of the Plaintiff Towns and ordered the Defendant to remove the poles and sirens at its sole expense within 30 days (A-2). By opinion dated March 29, 1988, the New Hampshire Supreme Court reversed the decision of the trial court (A-3). This opinion is reported in Volume 130 New Hampshire Reports. On April 21, 1988, the New Hampshire Supreme Court ordered that Town of Rye's Motion for Reconsideration be denied (A-4).

JURISDICTION

The decision of the New Hampshire Supreme Court is dated March 29, 1988. On April 21, 1988, the New Hampshire Supreme Court denied the Motion for Reconsideration filed by the Town of Rye. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are set forth in full in the Appendix, pursuant to Sup. Ct. R. 21:

U. S. Const. art. 6, c. 2
42 U. S. C. § 2013
42 U. S. C. § 2021
N. H. Rev. Stat. Ann.
§§ 107-B:1, 107-C:(I)
N. H. Rev. Stat. Ann.
§ 231:160
N. H. Rev. Stat. Ann.
§ 231:161

STATEMENT OF THE CASE

The Respondent, Public Service Company of New Hampshire, is a private electric utility company and controlling partner in the construction of the Seabrook Nuclear Power Station. On July 9, 1984, the Respondent submitted an application for a pole license to the Town Clerk of Rye. The application was submitted with no cover letter and did not reveal the special warning purpose to which the poles would be put.

In September 1984, an official of the Town of Rye signed the Respondent's pole license application after it had been routinely processed; the State Department of Transportation gave its permission to the company to install the poles. On November 7, 1985, the Respondent began installing poles with attached sirens within the municipality, two on municipal property. Affixed to the top of each pole is a 6-foot, 500-pound siren/public address system.

On November 20, 1985, the Town of Rye issued a cease and desist order against the Respondent's actions in installing the poles and revoked the pole license which had been issued by the Town to the Respondent. The Town also advised the Respondent that the installation of any poles for the purpose of attaching sirens to the poles was unacceptable to the Town.

After the Respondent refused to obey the cease and desist order issued by the Petitioner, the Petitioner instituted an action for declaratory relief. The Petitioner sought an order allowing it to revoke the pole license it had granted and also sought removal of certain poles installed within the town limits on state-maintained highways under licenses issued by the State. Citing Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 604 F. Supp. 1084 (E.D.N.Y. 1985), and Long Island Lightning

Co. v. County of Suffolk, 628 F. Supp. 654 (E.D.N.Y. 1986), the Town contended as follows:

> Case law indicates that under federal law a locality properly may refuse to participate in or cooperate with the formation and adoption of an emergency response plan for a nuclear power facility. The Petitioner, in refusing to approve the installation of poles and sirens within the municipality, is exercising this recognized right to withhold its support for such an emergency response plan.

(Trial Brief of the Town of Rye at 8.)

The Town of Hampton Falls was permitted to intervene to similarly seek removal of poles located in the Town. Following a hearing on November 26, 1986, the court determined that the State of New Hampshire Department of Transportation was a necessary party for the resolution of the dispute and ordered it to file responsive pleadings.

By order dated January 20, 1987, the Superior Court ordered removal of the poles and the siren/public address systems at

the Respondent's expense within 30 days of the order. The trial court noted the exclusivity of the list of authorized use enumerated N. H. Rev. State Ann. § 231:160, and the fact that the use of poles as part of a public emergency system was not included within the statute's coverage. Although not specifically reaching the Petitioner's claim of a federal right to act, the court did reject the Respondent's contention that Petitioners acted illegally in preventing the implementation of a federally required evacuation plan (Order of trial court dated January 20, 1987 at 1, 6). The court held that the licenses granted by the Town of Rye and by the State Department of Transportation for the erection of poles for a system of public notification were null and void.

On appeal, the petitioner contended that nuclear emergency warning systems were

not encompassed by state statutes concerning utility poles (brief on Appeal at 8). The Petitioner further noted as follows:

> [T]he Appellee's refusal to issue permits to the Appellant Company was based on its objective determination that, pursuant to the Appellee's plant, town residents could not safely be evacuated in the event of emergencies at the Seabrook station in instances of even moderate releases of radiation...
>
> The Appellee refusal to issue permits for the installation of said poles and sirens as part of a nuclear emergency response plan was clearly valid as an exercise of its well-recognized police powers.

(Brief on Appeal, Town of Rye, at 19).

The Supreme Court of New Hampshire reversed the judgment of the trial court, finding that state statutes regarding utility pole licensing did encompass emergency warning poles, and further finding that a town cannot exercise "veto power" over a radiological emergency response plan (Opinion of the Supreme Court of New Hampshire at 4). The

New Hampshire Supreme Court refused Petitioner's Motion for Reconsideration, which claimed, in part, as follows:

> The Town is concerned with such matters as a safe and orderly traffic flow in the event of evacuation and the provision of emergency services to those injured, perhaps in traffic, while in the process of evacuation.
>
> ... The Town maintains that the above-stated goals fall within the authority of local communities and that the Town may properly seek to participate in the planning process by the protection of those goals. Public Service Company of New Hampshire v. West Newbury 835 F.2d 380 (1st Cir. 1987); in fact, absent any affirmative interference amounting to a regulating of nuclear power, the Town may refuse cooperation with a particular proposal. Citizens For An Orderly Energy Policy, Inc. v. Suffolk County, 604 F. Supp. 1084 (E.D.N.Y. 1985).

(Motion for Reconsideration filed by Town of Rye at 8.)

ARGUMENT

THE DECISION OF THE NEW HAMPSHIRE SUPREME COURT BOTH DENIES THE PETITIONER RIGHTS WHICH ARE WELL-ESTABLISHED UNDER THE FEDERAL LAW AND CONFLICTS WITH THE MANDATE OF FEDERAL STATUTES.

The resolution of this case will affect the exercise of traditional authority of state and local governments, the regulation of nuclear power by the federal government, and the interaction between federal and local areas of regulation. For these reasons, which prompted this Court's examination of the claims presented in Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), this case is important and should be taken up by the Court. 464 U.S. at 248.

This dispute requires construction and interpretation of the Atomic Energy Act and, thus, has arisen under that federal law.

See Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 604 F. Supp. 1084, 1090 (E.D.N.Y. 1985), aff'd, 813 F.2d 570 (2d Cir. 1987). The Petitioner claims a right guaranteed by federal statutes, specifically by the Atomic Energy Act. This right has been denied by the New Hampshire court's interpretation of state law. Moreover, the decision of the Supreme Court of New Hampshire has involved a question of federal law which has not been specifically addressed by this Court -- the issue of the extent of local authority to refuse the installation of certain emergency warning sirens, out of concern for factors other than purely radiological safety. The refusal of the state court to allow this local action conflicts with the Court's reservation of a local right of action for purposes other than protection against radiological hazards. Silkwood v. Kerr-McGee Corp., supra, 464 U.S. 238; see

also 42 U.S.C.A. section 2021(k) (West 1973).

Few issues have fostered such "widespread concern, inspired such acrimonious debate and proven more difficult to resolve" than those issues which focus on this nation's use of nuclear power. Wiggins, "Federalism Balancing and the Burger Court: California's Nuclear Law as a Preemption Case Study," 13 U.C. Davis L. Rev. 3 (1979). The Nuclear Regulatory Commission's offsite planning rules have been characterized as having created a "regulatory quagmire." Note, "Federalism and Offsite Emergency Planning for Nuclear Reactors: The Shoreham Impasse," 66 B.U.L. Rev. 229, 266 (1986). Meanwhile, relevant judicial decisions from jurisdictions throughout the country have often conflicted while providing no useful principles by which to reconcile their holdings.

See, e.g., Public Service Co. of New Hampshire v. Town of West Newbury, 835 F.2d 380 (1st Cir. 1987) (holding that a plant owner failed to show irreparable harm from the town's removal of poles bearing emergency sirens); Long Island Lighting Co. v. County of Suffolk, New York, 628 F. Supp. 654, 666 (E.D.N.Y. 1986) (holding that a nuclear plant owner demonstrated a likelihood of success on the merits of its claim that federal law preempted a local law making it illegal to engage in emergency testing without the approval of the local legislature); Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, supra, 604 F. Supp. 1084, 1096 holding that the county's refusal to participate in offsite emergency planning was not preempted by federal law); Marshall v Consumers Power Co., 65 Mich. App. 237, 237 N.W. 2d 266, 274 (1975) (holding that a state

nuisance action directed against a proposed nuclear plant could consider any "nonradiological hazards," but that federal law preempts a consideration of the "workability" of the plant); Bennett v. Malinchrodt, 698 S.W. 2d 854, 863 (Mo. 1985), cert. denied, 476 U.S. 1176 (1985) (holding that an action for negligence, assault and battery and stict liability against a plant operator for injuries suffered by nearby workers was not barred by the doctrine of federal preemption); and Van Dissel v Jersey Central Power and Light Co., 194 N.J. Super. 108, 476 A.2d 310, 316 (App. Div. 1984) (where, on remand from the United States Supreme Court, the New Jersey court held that federal law did not preempt a compensatory award for property damage which was sustained as a direct result of problems with a nuclear plant cooling system). The decision of the Supreme

Court of New Hampshire which denies the local right here claimed conflicts with each listed decision which upholds a local claim or right against a claim of preemption. A resolution of the instant case will provide much-needed guidelines for deciding all future similar cases.

A. THE PETITIONER HAS AN OBLIGATION UNDER STATE LAW TO PARTICIPATE IN THE EMERGENCY PLANNING PROCESS.

State law requires that Petitioner to play a significant role in emergency planning. New Hampshire law declares that "(t)he director of emergency management shall, in cooperation with affected local units of government, initiate and carry out an nuclear emergency response plan ..." N.H. Rev. Stat. Ann. Sec. 107-B:1 (Supp. 1987) (emphasis added). The New Hampshire legislature has also provided for local organizations to perform emergency management functions, subject

to the control of the local board of selectmen. N.H. Rev. Stat. Ann. Sect. 107-C:8(I). "Where state law mandates that selectmen take responsibility for civil defense functions, the selectmen must carry out this duty." Vernet v. Town of Exeter, 129 N.H. 34, 523 A. 2d 48, 51 (1986). Throughout the instant dispute, the Petitioner has consistently acted in accordance with this statutory mandate.

Thus, pursuant to New Hampshire law, local officials serve an important role in the state's emergency management process. The federal regulatory scheme does not displace local authority to act. Rather, federal law recognizes that "(t)he promotion of safety of persons and property is unquestionably at the core of the State's police power." Kelley v. Johnson, 425 U.S. 238, 247 (1976). Local entitites retain their sovereign authority "to the extent that the Constitution has not divested them of their original powers and

transferred those powers to the Federal Government." Garcia v. San Antonion Metropolitan Transit Authority, 469 U.S. 528, 549 (1985).

B. FEDERAL LAW PRESERVES AND PROTECTS THE LOCAL RIGHTS OF PARTICIPATION IN NONRADIOLOGICAL REGULATION.

The Atomic Energy Act reserves to state and local entities the right to regulate for all purposes other than protection against radiological hazards. 42 U.S.C.A. Sect. 2021(h); Van Dissel v. Jersey Central Power & Light Co., 465 U.S. 1001, decision on remand, 194 N.J. Super. 108, 476 A.2d 310 (App. Div. 1984); Silkwood v. Kerr-McGee Corp., supra, 464 U.S. 238. In the instant case, the Petitioner is necessarily concerned about its ability to provide sufficient traffic control to evacuees and ambulance and other emergency services in the event of an emergency. These

are precise the sorts of functions which federal law reserves to local control.

As originally enacted, the Atomic Energy Act ended a federal monopoly over the use, control and ownership of nuclear technology. Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 206 (1983). The 1959 amendments to the Act were enacted in order to "clarify the respective responsibilities . . . of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials." 42 U.S.C.A. Sect. 2021(a)(1). "{T}he point of the 1959 Amendments was to heighten the States' role." 461 U.S. at 209. "The 1959 legislation provided for continued federal control over the more hazardous materials because 'the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with

them during the forseeable future.'" Silkwood v. Kerr-McGee Corp., supra, 464 U.S. at 250 (citing H.R. Rep. No. 1125, 86th Cong., 1st Sess. 3 (1959).

Thus, continued federal regulation over nuclear plants has resulted from a concern over the complexity of radiological operations. Yet, even within the sphere of "exclusive" federal jurisdiction, states have been provided an "advisory role." For instance, 42 U.S.C.A. Sect. 2021(g) directs the Commission to cooperate with states in forming standards against radiation hazards. See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, supra 461 U.S. at 209 n.21. Congress not only created a scheme pursuant to which state and local entities were free to act in all but a few clearly defined areas; Congress has also encouraged local participation in radiological decisions -- those areas deemed the

"exclusive" province of the federal government. The clear congressional intent has been the preservation of the traditional police power functions of localities, especially in all nonradiological concerns. The Petitioner is entitled to act in response to such concerns as a safe traffic flow and the provision of emergency services in the event of an evacuation.

In Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, supra 461 U.S. 190 (1983), this Court "for the first time explicitly ruled that decisions regarding nuclear power are not within the exclusive province of the federal government." Tomain, "Law and Policy in the Activist State -- Rethinking Nuclear Regulation," 38 Rutgers L. Rev. 187, 209 (1986). In Pacific Gas, the Court upheld the constitutionality of a California state moratorium on the certification of nuclear plans, while

also upholding the appellate court's refusal to declare that law preempted by the Atomic Energy Act.

In Silkwood v. Kerr-McGee Corp., supra, 464 U.S. 238, the Court found that a state-authorized award of punitive damages was not preempted by federal law as "punish(ing) and deter(ring) conduct related to radiation hazards." 464 U.S. at 249. In answer to a charge of frustration of congressional purpose, the Court in Silkwood reiterated that "the promotion of nuclear power is not to be accomplished 'at all costs'" 464 U.S. at 257. Where Congress declared that atomic energy should only be developed to the extent "consistent 'with the health and safety of the public,'" 42 U.S.C.A. SDect. 2013(d), Congress also "disclaimed any interest in promoting the development and utilization of atomic energy by means that fail to provide adequate remedies for those who are injured

by exposure to hazardous nuclear materials." 464 U.S. 257.

Shortly thereafter, the Court vacated the judgment rendered in Van Dissel v. Jersey Central Power & Light Co., 181 N.J. Super. 516, 438 A.2d 563 (App. Div. 1981), and remanded the case for further consideration in light of Silkwood. On remand, the New Jersey court ruled that federal law did not preempt a compensatory award for property damage which arose from a nuclear power plant cooling system. Van Dissel v. Jersey Central Power & Light Co., supra 476 A.2d at 319. The court rejected an interpretation of federal preemption requirement which was based solely on the broadly phrased dicta of Pacific Gas and found that the admitted "safety" nature of the claim did not bar the action.

Thus, a safety-related function is reserved for localities. This conclusion is

borne out by the opinion of the Boards of Nuclear Regulator Commission. In In the Matter of Long Island Lighting Co., 21 N.R.C. 644, aff'd, 22 N.R.C. 651 (1985), reversed on other grounds, 24 N.R.C. (1986), the Licensing Board ruled that such "local matters" as the "flow of traffic on public roads" during an emergency are not preempted from local consideration. 21 N.R.C. at 904. Affirming, the Appeals Board stated as follows:

> To be sure, the conduct of such nonradiological activities heavily influences whether, or to what extent, viable emergency plans can be developed without governmental participation. But, as demonstrated by the Silkwood and Pacific Gas & Electric cases, such laws do not invade the federal domain simply because they have significant effect on nuclear power issues or even forclose the nuclear option entirely.

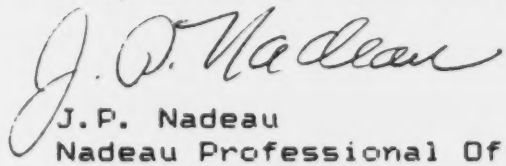
In summary, there has clearly been widespread acknowledgement of a federal right of locality to act for purposes other than protection against purely radiological hazards. In the instant case, Petitioner's concerns

about safe traffic regulation and the provision of emergency service to evacuees fall well within the scope of authority reserved to localities by federal law. The decision of the Supreme Court of New Hampshire, which effectively denies Petitioner this federal right, should be reversed.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Court to grant this petition and issue a write of certiorari to the New Hampshire Supreme Court.

Respectfully submitted,



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APPENDIX

APPENDIX 1

STATE OF NEW HAMPSIRE

ROCKINGHAM, SS: SUPERIOR COURT
(M.H.)

TOWN OF RYE, et al)
)
V.) Docket No. 86-E-34
)
PUBLIC SERVICE COMPANY)
)
OF NEW HAMPSHIRE)

ORDER

The plaintiff, Town of Rye, seeks declaratory relief allowing it to revoke certain pole licenses previously granted by the town's selectmen to the defendant to install poles on town-maintained right of way; and further, seeking the removal of poles installed within town limits on State-maintained highways, which were placed by the defendant pursuant to licenses issued by the State.

The Town of Hampton Falls has intervened as party plaintiff likewise seeking removal of poles located within the town on State-maintained highways.

The defendant is the controlling partner in the construction of the Seabrook Nuclear Power Station. As such, it is required by the Nuclear Regulatory Commission to develop a means of evacuation and response to potential catastrophes at the plant.

As part of its plan for evacuation and response, the defendant has installed a system for public notification consisting of a series of sirens placed on poles located in several New Hampshire communities, including the plaintiffs. The poles are appproximately 60 feet in height (as opposed to usual utility poles, 35 feet in height) and attached to the top of the poles is a 500 pound siren/public address system.

In November 1985, the defendant, through its Manager of Nuclear Projects, notified the Board of Selectmen of its intent to install these poles and sirens in different areas of the town. The selectmen made it clear by appropriate responses that it was their

intention to resist any such attempt.

Notwithstanding their insistence that they would not cooperate by permitting the poles to be installed for these purposes, the Selectmen, on September 10, 1984, pursuant to RSA 231:161 I(a), granted applications for pole permits submitted by the defendant to the Town Clerk on 7/9/84 for this purpose. It is the contention of the town selectmen that they were not aware that these poles were to be used for anything other than transmission of electric power despite the fact that the defendant's agent had indicated to the selectmen that they would be seeking pole licenses for this purpose.

Pursuant to the licenses, the defendant installed the poles and, in addition, installed a number of poles with like sirens on State-maintained highways located in the Town of Rye pursuant to licenses granted by the State pursuant to RSa 231:161 I(c). The defendant has likewise installed a series of

poles on State-maintained highways located in the Town of Hampton Falls pursuant to licenses obtained from the State.

The ultimate issue to be determined is whether RSA 231:160, et seq., authorizes the town and/or state to issue pole licenses for purposes related to this siren warning system.

Because the resolution of this petition for declaratory judgement necessarily involves judicial interpretation of those statutes, under the authority of which the State Department of Transportation purported to act in permitting the placement of the poles in the State-controlled rights of way, it is found that the State is a necessary party to these proceedings. To decide the issue as it pertains to the authority of the town selectmen to issue such licenses without giving the State an opportunity to be heard, thereon, could have the effect of binding the

town and not the State, which has the potential of leading to inconsistent results. Faulkner v. Keene, 85 NH 147 (1931).

It is accordingly ordered that orders of notice issue to the State of New Hampshire Department of Transportation together with a copy of the petition for declaratory judgement and this order requiring the State to file a formal answer within 20 days from the date of the issuance thereof.

It is further ordered that no further hearings on this matter will be held absent a specific request therefor by the State. The State shall have a period of 20 days from the date of filing of their answers to submit such memoranda of law on the issues as it wishes the Court to consider for the resolution of this petition.

DATED: Nov. 26, 1986

/s/ Walter L. Murphy

Walter L. Murphy

Presiding Justice

APPENDIX 2

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

* * * * * * * * * * * * * * * * * *

TOWN OF RYE, ET AL *

V * No. 86-E-34

PUBLIC SERVICE COMPANY OF N.H. *

* * * * * * * * * * * * * * * * * *

ORDER

The Plaintiff, Town of Rye, brought this action for declaratory relief against the Defendant, Public Service Company of New Hampshire, seeking an order allowing it to revoke certain pole licenses granted the Defendant to install poles on town-maintained rights-of-way and, further, seeking the removal of certain poles installed within the town limits on state-maintained highways under licenses issued by the state. The Town of Hampton Falls had intervened likewise seeking the removal of poles located in the town on state-maintained highways. On November 26, 1986, this Court determined that

the State of New Hampshire Department of Transportation (DOT) was a necessary party for the resolution of of this dispute and ordered the DOT to file responsive pleadings.

The Defendant, Public Service, is the controlling partner in the construction of the Seabrook Nuclear Power Station. As such, it is required by the Nuclear Regulatory Commission to develop a means of evacuation and response to potential catastrophes at the plant.

As part of its plan for evacuation and response, the Defendant has installed a system for public notification consisting of a series of sirens placed on poles located in several New Hampshire seacoast communities, including the Plaintiff Towns. The poles are approximately 60 feet in height (as opposed to a standard utility pole 35 feet in height) and attached to the top of the poles is a 500 pound siren/public address system. This is the sole use of the pole; it is used for no

other purpose.

In November of 1985, the Defendant, through its Manager of Nuclear Projects, notified the Board of Selectmen of the Town of Rye of its intent to place these poles and sirens in different areas of the town. The selectmen made it clear by appropriate response that it was their intention to resist any such attempt.

Notwithstanding their insistence that they would not cooperate by permitting the poles for these purposes, the Selectmen, on September 10, 1984, pursuant to R.S.A. 231:161 I(a), granted applications for pole permits submitted by the Defendant to the Town Clerk on July 9, 1984 for this purpose. It is the contention of the town selectmen that they were not aware that these poles were to be used for anything other than the transmission of electric power despite the fact that the Defendant's agent had indicatedd to the selectmen that they would be seeking pole licenses for this purpose.

Pursuant to these licenses and licenses granted by the DOT purportedly under the authority of R.S.A. 231:160 et seq., the Defendant has installed a number of poles with sirens throughout the Town of Rye on town-maintained highways and state-maintained highways. The Defendant has likewise installed a series of poles on state-maintained highways located in the Town of Hampton Falls pursuant to licenses obtained from the DOT.

The ultimate issue to be determined is whether R.S.A. 231:160 et seq., authorizes the towns and/or the State to issue pole licenses for the erection of poles for purposes related solely to this siren warning system. The Defendant and the DOT maintain shat said statutes are to be interpreted to include this purpose while the Plaintiff and intervenor maintain that this use is not consistent with the language or intent of the statute.

The authority to erect poles on the highways of the State is found in R.S.A. 21:160 which reads as follows:

> "Authority to Erect. Telegraph, television, telephone, electric light and electric power poles and structure, and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cable may be supported on such poles and structures or carried across or placed under any such highways by any person, copartnership or corporation as provided in this subdivision and not otherwise".

Thus, any pole erected on the highways of the State must be used within the parameters of this statute. Therefore, any license granted for the erection of a pole for the purpose outside of these parameters is null and void.

The legislature, through this statute, has listed those uses or purposes for which poles may be erected (the statute does not list the types of companies which may erect poles as the State contends). The list includes "telegraph, television, telephone, electric light and electric power poles ...," a very specific and limited enumeration.

It is a well-established principle of statutory construction that "the expression of one thing in a statute implies the exclusion of another" In Re Gamble, 118 N.H. 771, 777 (1978); See also Vaillancourt v Concord General Mutual Insurance Company, 117 NsH. 48 (1977); 2A J.Sutherland, Statutes and Statutory construction, Section 47.23-24 (4th ed. C. Sands 1973).

In this case, the legislature has provided a very specific and limited enumeration of uses for which poles may be erected on public highways. The statute contains no terms indicating the non-exclusivity of this list;

such as "such as ...," "like ..." or "including but not limited to ..." Therefore, applying the above stated principle of statutory construction, this Court must conclude that the legislature did not intend to allow the erection of poles by utility companies for any purpose the company may see fit, but only for those purposes listed. Thus, the licenses granted by the Defendant by the Town of Rye and the State Department of Transportation for the erection of poles for a system of public notification were granted without statutory authority and are, therefore null and void. Accordingly, the poles erected pursuant to these licenses were erected without authority.

This position is further supported by the legislative history of RSA 231:160. The statute has been amended a number of times since its passage in 1881 to accommodate technological innovations and the needs of society. These innovations include

telephones, television, electric lights and electric power. Each time the legislature has specifically amended the statute to provide for these innovations and has specifically listed that particular innovation as a permissable use for utility poles. The legislature could have used broad language in providing for future innovations or societal needs but has chose, instead, to provide specifically for each new use. Obviously, then, it is the role of the legislature to accommodate these new uses and not the role of this Court.

Even assuming arguendo, the list was not intended by the legislature to be exclusive, these poles and the use to which they have been put are not within the general nature of the types of uses designated in the statute. Excluding electric light poles, the poles designated in the statute are all utility poles; that is, they are all employed to provide some direct service to the public.

They all transmit some service to the homeowner. The Defendant argues that these poles do relate to the transmission of electricity. This relationship, however, is far too attenuated. In fact, the purpose to which these poles are put is far too novel to have been contemplated by the legislature in this statute.

Finally, these siren/public address systems can hardly be termed appurtenances. Webster defines an appurtenance as "a subordinate part of adjunct: accessory object," Webster's Collegiate Dictionary (1974). It's obvious that the sole purpose of these poles is the siren/public address sytem. They are, therefore, not subordinate or adjunct parts, but the only feature of these poles.

Defendant has cited in its Supplemental Memorandum of Law the case of Vernet, et al v. Exeter, 128 N.H. -------, (decided December 30, 1986 for the proposition that municipalities cannot exercise veto power

over the State's performance of its statutorily mandated functions. It contends that, by challenging the applicability of RSA 231:160 et seq., the plaintiff Towns are, in effect, seeking to exercise local authority to prohibit the State from implementing a nuclear emergency response plan as it is obliged to do under RSA 107-A, et seq and RSA 107-B et seq. This argument is without merit, however, as, in any event, it is not the State, but the defendant company which is taking the action the town seeks to enjoin. In short, the State is not, in authorizing the erection of the poles by the Defendant, exercising a function statutorily mandated. It is, rather, relying on the legislative authority of RSa 231:160 et seq, which for the reasons given herein does not authorize the erection of poles for this purpose.

For the foregoing reason, the Defendant is ordered to cause the removal of these poles and the siren/public address systems at is

sole expense within 30 days of the date hereof.

So Ordered.

January 20, 1987 /s/Walter L. Murphy
Walter L. Murphy
Presiding Justice

APPENDIX 3

NOTICE: This Opinion is subject to Motions for Rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the Opinion goes to press. THE CONTENTS OF THIS OPINION MAY BE DISCLOSED AT OR AFTER 8:00 A.M. ON THE DATE THE OPINION BEARS. IF THE OPINION IS RECEIVED BEFORE THAT TIME AND DATE, ITS CONTENTS SHOULD BE KEPT CONFIDENTIAL.

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham

No. 87-062

TOWN OF RYE and TOWN OF HAMPTON FALLS

v.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE and

THE STATE OF NEW HAMPSHIRE DEPARTMENT

OF TRANSPORTATION

Nadeau Professional Offices, of Portsmouth (J.P. Nadeau on the brief and orally), for the plaintiff Town of Rye.

Backus, Meyer & Solomon, of Manchester (Bartram C. Branch, Jr. on the brief and orally), for the plaintiff Town of Hampton Falls.

Sulloway, Hollis & Soden, of Concord (Margaret H. Nelson on the brief and orally) for the defendant Public Service Company of New Hampshire.

Stephen E. Merrill, attorney general (Michael J. Walls, assistant attorney general, on the brief and orally), for the State Department of Transportation.

JOHNSON, J. The defendant Public Service Company of New Hampshire (PSNH), jointed by the New Hampshire Department of Transportation (DOT), appeals an order of the Trial Court (Murphy, J.) permitting the Town of Rye to revoke the licenses which the town

had granted PSNH to erect siren poles on town-maintained rights-of-way as part of an evacuation plan for the Seabrook Nuclear Power Station. The court directed PSNH to remove those siren poles, as well as other siren poles which PSNH had erected in Rye and Hampton Falls on State-maintained highways. We reverse.

PSNH is the major owner of the Seabrook Nuclear Power Station. The plant is required by the federal Nuclear Regulatory Commission (NRC) to develop a Radiological Emergency Response Plan (RERP), which includes a evacuation plan, in order to be prepared for a potential accident at Seabrook Station. As part of its RERP, PSNH installed a public notification system consisting of sirens placed on poles located in several seacoast communities, including Rye and Hampton Falls. The poles are approximately sixty feet in height and have attached to them siren/public

address systems each weighing approximately 500 pounds.

On July 9, 1984, PSNH submitted to the Rye Town Clerk an application for licenses for three poles, to be erected on town-maintained highways in Rye. Subsequently, on July 11, 1984, PSNH submitted to the DOT a separate application in order to obtain licenses for siren poles to be placed on State-maintained highways in Rye and Hampton Falls. On September 10, 1984, the Rye Board of Selectmen, pursuant to RSA 231:161, I(a), granted the licenses sought by the company. On September 20, 1984, the DOT gave PSNH permission to begin installing the siren poles. On or about November 7, 1985, PSNH commenced installing four siren poles in Rye on State rights-of-way and two poles on town maintained highways.

On or about the same date, the Rye Board of Selectmen issued a cease and desist order against PSNH and revoked the pole licenses

which it had been issued on September 10, 1984. After PSNH refused to obey the cease and desist order, Rye instituted a "Petition for Declaratory Judgement With Prayers for Specific Performance" against PSNH, seeking (1) a ruling that the previously granted pole licenses on State and town highways were not properly authorized and (2) orders for their removal.

Hampton Falls was permitted to intervene in Rye's action, in order to seek the removal of siren poles which had been erected on State maintained highways in that town pursuant to State authorization. Hampton Falls claimed the poles had been placed contrary to two consecutive town meeting votes which had expressly prohibited the installation of the siren poles unless and until the citizens of Hampton Falls approved an overall evacuation plan for Seabrook Station. PSNH had not erected any siren poles on town-maintained highways in Hampton Falls because the Hampton Falls Board of Selectmen had denied licenses

on the ground that the proposed emergency plan was inadequate to warn and protect the town's residents in the event of a nuclear accident.

On November 26, 1986, a hearing was held on the petition of Rye and Hampton Falls, after which the trial court determined that the DOT was a necessary party to the towns' action and ordered the agency to file responsive pleadings.

On January 20, 1987, the trial court ordered the removal of all poles and siren/public address systems within the two towns at PSNH's expense within thirty days, whether located on State or municipal highways. This decision was based on the conclusion that the poles and sirens were not utility facilities, installations or structures within the meaning of RSA 231:160. The court determined that the licenses which Rye and the DOT had granted for the erection of siren poles had been

granted without statutory authority and were therefore null and void. PSNH appeals the trial court's order.

PSNH argues that the trial court erred in ruling that RSA 231:160 does not apply to siren poles installed as part of a federally mandated public notification system for Seabrook Station. We agree with PSNH that the trial court's construction of RSA 231:160 is unduly restrictive.

RSA 231:160 states:

"Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or

corporation as provided in this subdivision and not otherwise."

The trial court determined that the legislature did not intend to allow utility companies to erect poles for the purpose of warning citizens of a nuclear emergency, but only for the transmission of telegraph, television and telephone signals and electric light and power. Hence, the trial court found that the licenses which had been granted to PSNH by Rye and the DOT for the erection of siren poles had been granted without statutory authority and were void.

We begin our analysis with an interpretation of the applicable statutes. In any case involving the construction of a statute, the starting point must be the language itself, and plain and unambiguous language will be given effect. Theresa S. v. Sup't of YDC, 126 N.H. 53, 55, 489 A.2d 592, 593 (1985); Dover Professional Fire Officers Assoc. v. City of Dover, 124 N.H. 165, 169,

470 A.2d 866, 868 (1983); Sutherland Stat Const Sec. 46.01 (4th ed. 1984). Words and phrases will be given their usual and common meaning unless the statute itself suggests otherwise. Appeal of Public Serv. Co. of N.H., 125 N.H. 46, 52, 480 A.2d 20, 24 (1984).

A subdivision of RSA chapter 231 provides for "Lines of Telegraph and Other Companies in Highways," and RSA 231:159 makes the provision of that subdivision applicable to all cities and towns. RSA 231:161, VI states that "[t]he holder of such a license [to erect poles], shall . . . be entitled . . . to erect . . .poles [and] structures . . . and to place upon such poles and structures the necessary . . . attachments and appurtenances which are required in the reasonable and proper operation of the business carried on by such licensee . . ." We conclude that sirens are "attachments" within the meaning of RSA 231:160 and RSA 231:161, VI.

The selectmen of Rye lack authority to revoke the licenes they granted to PSNH, or to deny applications for licenses to erect three siren poles on town-maintained highways for any reason other than a reason relating to "the safe, free and convenient use for public travel of the highway . . ." which is the criterion for the exercise of the selectmen's authority under the statute; and no safety-based justification for the revocation was articulated by the town. RSA 231:168.

In Vernet v. Town of Exeter, 129 N.H. 34, 523 A.2d 48 (1986), we concluded that RSA chapter 107-B requires that the State civil defense agency "must enclist the aid of the towns when preparing a [R]ERP for each of the affected towns, so that input will be received from each of the affected areas. This does not, however, give a town . . . veto power over [R]ERPs developed by the State civil defense agency." Id. at 39, 523

A.2d at 51. (Emphasis in original.) Similarly, RSA 231:159 et seq. do not give a town veto power over the erection of siren poles, pursuant to a RERP. Hampton Falls lacked authority to prohibit either cooperation by selectmen with radiological emergency response planning for Seabrook Station, or construction by PSNH on State highways in Hampton Falls of any installations necessary for the implementation of a RERP.

In a closely related case, Public Serv. Co. of N.H. v. Town of W. Newbury, 835 F.2d 380 (1st. Cir. 1987), PSNH's request for a preliminary injunction to allow its siren poles to remain in place was denied because PSNH failed to prove a likelihood of success in its argument that Massachusetts statutes permit the erection of siren poles for the Seabrook evacuation plan. The key Massachusetts statute in question, ch. 166, sec. 21, refers to the "transmission of electricity" for various purposes and permits

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a company incorporated for such transmission to construct "lines for such transmission upon, along, under and across public ways . . ." Mass. Gen. L. ch. 166, sec. 21. The New Hampshire statutes vary in two significant ways: (1) RSA 231:160 does not refer to poles used to "transmit" power; and (2) there is no Massachusetts counterpart to RSA 231:161, VI which allows for the erection of poles "which are required in the reasonable and proper operation of the business carried on by such licensee . . . ." The New Hampshire statute, like the Massachusetts statute, has been amended from time to time as new technology has developed. However, we conclude that RSA 231:161, VI made it unnecessary for our legislature to amend the statute to specifically permit siren poles, since such poles are necessary for PSNH to carry out its business in supplying the electrical needs of its customers.

We hold that the trial court erred in ruling that the pole licenses had been granted without statutory authority and hense were null and void, and in ordering PSNH to remove the poles and sirens which PSNH had erected and placed in Rye and Hampton Falls. We reverse the decision of the trial court.

Reversed.

BATCHELDER, J., dissented; the others concurred.

BATCHELDER, J., dissenting: Because I do not read RSA 231:160 and :161, VI as broadly as the majority. I would uphold the trial court and therefore respectfully dissent.

APPENDIX 4

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-062 Town of Rye & Town of Hampton Falls v. PSC & a. the court upon April 21, 1988 made the following order:

Town of Rye's motion for reconsideration is denied.

Distribution:

J.P. Nadeau, Esq.

Counsel: Martin L. Gross

Robert Backus, Esq.

Michael J. Wallis, Esq.

Clerk, Rockingham County Superior Court

Ralph H. Wood,

Clerk

APPENDIX 5

Statutory

Provisions Involved

Lines of Telegraph and Other Companies in Highways

231:160 Authority to Erect. Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachment and appurtenances may be erected, installed and maintained in any public highway and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation as provided in this subdivision and not otherwise.

231:161 Procedure. Any such person, copartnership or corporations desiring to erect or install any such poles, structures, conduits, cables or wires in, under or across

any such highway, shall secure a permit or license therefor in accordance with the following procedure:

I. Jurisdiction.

(a) Town Maintained Highways. Petitions for such permits or licenses concerning town maintained highways shall be addressed to the selectmen of the town in which such highway is located; and they are hereby authorized to delegate all or any part of the powers conferred upons them by the provisions of this section to such agents as they may duly appoint.

(b) City Maintained Highways. Petitions for such permits or licenses concerning city maintained highways shall be addressed to the board of mayor and aldermen or board of mayor and council of the city in which such highway is located and they shall exercise the powers and duties prescribed in this part for selectmen; and they are hereby authorized to

delegate all or any part of the powers conferred upon them by the provisions of this section to such agents as they may duly appoint.

(c) State Maintained Highways. Petitions for such permits or licenses concerning all class I and class III highways and state maintained portions of class II highways shall be addressed to the state commissioner of public works and highways who shall have exclusive jurisdiction of the disposition of such petitions to the same effect as is provided for selectmen in other cases, and also shall have like jurisdiction for changing the terms of any such license or for assessing damages as provided herin. The commissioner shall also have the same authority as conferred upon the selectmen by RSA 231:163 to revoke or change the terms and conditions of any such license. The

commissioner is hereby authorized to delegate all or part of the powers conferred upon him by the provisions of this section to such agent or agents as he may duly appoint in writing; he shall cause such appointments to be recorded in the office of the secretary of state, who shall keep a record thereof.

(d) The word "selectmen" as used in the following paragraphs of this section shall be construed to include all those having jurisdiction over the issuance of permits or licenses under paragraph I hereof.

II. Permits. The petitioner may petition such selectmen to grant a permit for such poles, structures, conduits, cables or wires. If the public good requires, the selectmen shall grant a permit for erecting or installing and maintaining such poles, structures, conduits, cables or wires. Such permit shall designate and define in a general way the location of the poles,

structures, conduits, cables or wires described in the petition therefor. Such permit shall be effective for such term as they may determine, but not exceeding one year from the date thereof, and may, upon petition, be extended for a further term not exceeding one year. A permit shall not be granted to replace an existing utility pole on any public highway unless such replacement pole is erected at least 20 feet from the surfaced edge or the edge of public easement therein, provided, however, that for good cause shown the selectmen may waive the 20 foot requirement.

III. Effects of Permit. Except as otherwise provided herein, the holder of such permit shall during the term thereof be entitled to have and exercise all the rights, privileges and immunities and shall be subject to all the duties and liabilities granted or imposed hereby upon the holder of the license

hereunder.

IV. Licenses. The petitioner may petition such selectmen to grant a license for such poles, structures, conduits, cables or wires. If the public good requires, the selectmen shall grant a license for erecting and installing or maintaining the poles, structures, conduits, cables or wires described in the petition.

V. Provision of Licenses. The selectmen in such license shall designate and define the maximum and minimum length of poles, the maximum and minimum height of structures, the approximate location of such poles and structures and the minimum distance of wires above and of conduits and cables below the surface of the highway, and in their discretion the approximate distance of such poles from the edge of the traveled roadway or of the sidewalk, and may include reasonable requirements concerning the

slacement of reflectors thereon. Such designation and definition of location may be by reference to a map or plan filed with or attached to the petition or license.

VI. Effect of License. All licenses granted under the provisions hereof shall be retroactive to the date the petition therefor is filed. The word "license" as hereinafter used herein, except in RSA 231:164 shall be construed to include the word "permit". The holder of such a license, hereinafter referred to as licensee, shall thereupon and thereafter be entitled to exercise the same and to erect or install and maintain any such poles, structures, conduits, cables, and wires in approximately the location designated by such license and to place upon such poles and structures the necessary and proper guys, cross-arms, fixtures, transformers and other attachments and

appurtenances which are required in the reasonable and proper operation of the business carried on by such licensee, together with as many wires and cables of proper size and description as such poles and structures are reasonably capable of supporting during their continuance in service; and to place in such underground conduits such number of ducts, wires and cables as they are designed to accommodate, and to supply and install in connection with such underground conduits and cables the necessary and proper manholes, drains, transformers and other accessories which may reasonably be required.

231:162. Confirming Locations. Similar proceedings may be had for locating and licensing poles and structures and underground conduits and cables already constructed with or without license, or for changing the location of any such property

constructed with or without license; but nothing contained in this section or this subdivision shall affect the validity of locations heretofore granted.

23:163. Changes. Any such licensee or any persons whose rights or interests are affected by any such license may petition the selectmen for changes in the terms thereof; and after notice to the parties and hearing, the selectmen may make such alterations therein as the public good requires. The selectmen, after notice to any such licensee and hearing, may from time to time revoke or change the terms and conditions of any such license, whenever the public good requires.